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FILED
MAR 17 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 743

OSWALD RENDON,

Petitioner,

against

JEAN GOLDNER,

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

This is an action to recover money damages for alleged personal injuries sustained in an automobile accident.

On a summer evening in 1957, the plaintiff, Oswald Rendon, went riding as a passenger in an M.G. automobile driven by the defendant Jean Goldner. The light sports-car overturned on a country road when its rear wheels skidded while negotiating a curve. The road bed consisted of oiled gravel (64a, 77a).

The case was tried in the United States District Court for the Southern District of New York, the Honorable EDWARD J. DIMOCK, presiding. A jury verdict was rendered for the defendant and the plaintiff appealed to the United States Court of Appeals for the Second Circuit. The verdict of the jury was unanimously affirmed.

Issues

The petitioner attempts to raise two issues in this petition for a writ of certiorari.

The argument is made that the jurisdiction of the Supreme Court of the United States should be invoked since the right to a fair jury trial was not preserved, because in this instance the Court reporter read the charge to the jury a second time in the jury room, after the plaintiff's counsel supposedly objected to this procedure and was overruled.

The argument is untenable since the premise on which it is grounded, i.e., that there was objection by the plaintiff's attorney, is without substance. Rather than objecting, plaintiff's attorney participated in, condoned, and approved the procedure adopted without exception or remonstrance.

ARGUMENT

POINT I

No question appropriate for review by the Supreme Court is presented in the petition for a writ of certiorari.

Even a cursory glance at the elements necessary for the Supreme Court to review the decision of the Court of Appeals, indicates that the special and important reasons outlined in Rule 19 of the Rules of the Supreme Court are completely absent.

The petitioner challenges no decision of any Court of Appeals. He asks for no reversal of any pertinent decisions or long standing doctrine of law. He cites only two cases with which no one can quarrel, with which we do

not disagree and with whose doctrine no departure was effected in this case.

The Court of Appeals found that the petitioner did not object to the procedure adopted in the Trial Court so that the Court was not given a fair opportunity to act with knowledge that an objection to a procedure was being voiced and pressed.

In a civil case a jury can be waived and hence it follows that so can the routine mechanics of the jury's deliberations. Of course, the Trial Court in this instance would have performed the routine task of having the charge repeated in the Courtroom, had the Court not been misled and deceived by what an appellate attorney now claims, were objections so clear and so determined that to have pressed them further would have affected the relationship between the plaintiff's attorney and the trial judge.

Despite the narrow limits of the petition, the petitioner has gone far afield by indulging in considerable irrelevant discussion of the claimed different versions of the evidence of the automobile accident given by the defendant on various occasions.

We take it most of this material was inserted despite its lack of relevancy to this petition for such subliminal effect as it might have upon the decision of this Court.

Though strongly tempted to do so (since we resisted these arguments in the Trial Court), our understanding of the function of a writ and the permissible limits of the opposition to it restrains us from answering.

We respectfully content ourselves with denying the appropriateness of the discussions of the facts of the accident and their accuracy contained on pages "4" and "5" of the petition.

The inclusion of this irrelevant material is even more striking when one appreciates that the portion of the

record concerning discussions and alleged objection of the plaintiff's attorney to the reporter entering a jury room to read the charge was not set out in the petition, so that the Court could see at a glance how spurious is the claim that not only that objection was made, but that this point was preserved for appeal.

It refutes the petition so completely that we set it out verbatim (105a to 107a inclusive)

Nothing more graphically demonstrates how the Trial Court in this case had every right to assume that plaintiff's counsel was cooperating in the procedure adopted and agreed with it.

"The Court: There is a note from the jury; gentlemen.

'May we please have the Judge's charge read to us?'

One thing would be to get them in here, tell them that would be quite an undertaking, and ask them to go back and see if they cannot pinpoint what they want a little better.

What do you think of that?

Mr. Levine: As your Honor wishes.

Mr. Reilly: May I make a suggestion to the (24) Court?

The Court: That is what I am asking for.

Mr. Reilly: I am quite willing, if your Honor pleases, that the reporter go in and read your Honor's charge to them without them coming here.

The Court: What do you think of that?

Mr. Levine: The whole charge? I say whatever your Honor rules on. I have no preference.

The Court: I never thought of having the reporter go into the juryroom and read it. Have you ever done that?

The Reporter: No.

Mr. Levine: I have no objection to that.

Mr. Reilly: I have none, and I thought it was done in this court. I thought it was done, and I am just trying to identify the occasion only for the information of the Court.

The Court: It gives them exactly what they want. My only thought was that usually communication between the bench and the jury is in the courtroom.

Another alternative would be to have the reporter sit here and read it to them.

Mr. Reilly: Good; whatever your Honor says. As I say, I just thought that it would be the easier (245) thing, and that's the only reason I made the suggestion. I can't think whether it was in Judge Byran's or Judge Murphy's courtroom that the reporter went in.

The Court: I think it sounds like a very good suggestion because if the reporter gets in there and is reading it and they don't understand part of it they can say, 'How is that again?' and they might not like to do that in the courtroom. It would be more informal. I think it is a very good suggestion.

All right. Will you go in with the charge as you have it?

Mr. Levine: Mr. Wingate suggests that that might lead to some colloquy between them or between them and the reporter that we would not be present at. He suggests that it ought to be done in here.

The Court: I think that we can trust the reporter to say that he will do nothing except read the charge as it is. Do not attempt to make any explanation whatsoever.

Mr. Levine: Then they should be cautioned not to have any conversation with respect to it, but just listen to it being read in his presence. I think that is the only danger involved.

The Court: Well, I can get them all in now, (246) tell them what I am going to do, say that the reporter will go in and read it to them, and if there is any part that they would like read over a second time he will do that, but that he is not authorized to make any explanations or suggestions to them or to answer any of their questions.

All right, will you ask them to come in?

(Jury in the box at 5:40 P.M.)

The Court: Ladies and gentlemen, I have your note which reads, 'May we please have the Judge's charge read to us?'

The reporter will go into the juryroom with you and will read the charge over to you, and if there is any particular part that you want to have read a second time, you can stop him and he will go back and read that over to you, but, of course, it is very unusual to have anybody except the jurors in the juryroom, so that you must not discuss the thing between yourselves in the reporter's presence, and he is not authorized to answer any questions of yours. The only thing that he can do is simply read what he has got on his notes, and he will read it as many times as you want him to do, but that is all that he can do for you.

(247) The Foreman: Your Honor, while the reporter is in the jury room would it be possible for him to read other excerpts of the testimony? Or would you prefer that not be done?

The Court: I think that we had better make haste slowly about that, and if you do want other excerpts make special requests for them after the charge has been read.

The Foreman: Yes, sir.

The Court: All right, you may retire. You understand that those requests would be to the Court and not to the reporter.

The Foreman: Yes, your Honor."

The foregoing demonstrates clearly why the petitioner avoids reference to the record. He prefers instead to attempt to deceive the Court by arguing that the procedures adopted were only after proper objection by plaintiff's counsel and that it would have been improper on petitioner's counsel's part to object further.

Rule 46 of the Rules of Civil Procedure is a salutary rule designed to effect the admirable purpose of eliminating formal or technical objections so long as the form of objection adopted does not deceive the Trial Judge and he understands fully that there is an objection and the grounds thereof.

Rather than objection, an examination of plaintiff's counsel's statements shows there was consent.

When the suggestion was first made, Mr. Levine, the petitioner's attorney first stated: "I say whatever your Honor rules on. I have no preference" (105a).

Thereafter, the Court made inquiries of the reporter whether he had ever done it, indicating that the Court had never thought of such a procedure. To this, Mr. Levine stated: "I have no objection to that" (105a).

After further colloquy, and after the Court indicated he was disposed to follow such procedure, Mr. Levine then stated: "Mr. Wingate suggests that that might lead to some colloquy between them or between them and the reporter that we would not be present at. He suggests it ought to be done in here" (106a).

If objection was intended, the most obtuse language possible was used and it is of course, obvious the suggestion did not even emanate from the petitioner's lawyer, Mr. Levine.

Finally, Mr. Levine requested only that the jury be cautioned not to have any conversation with respect to the charge. His last words on the subject were: "I think that is the only danger involved."

Negating even an inference that Mr. Levine even thought he had objected is the fact that this created issue was raised first in the Court of Appeals.

After the jury delivered its adverse verdict, the petitioner's attorney moved for a new trial.

The argument for a new trial was heard four days later on January 25th, 1960. During Mr. Levine's argument he made no reference at all to the reporter entering the jury room (109a-114a). His failure to do so indicates that at no time during the trial did he consider the procedure objectionable or that he considered that he had made known "• • • to the Court the action which he desires the Court to take or his objection to the action of the Court and his grounds therefor • • •" (Rule 46 of the Rules of Civil Procedure). He, of course, had ample time to raise every genuine issue at the time of this motion.

If his attorney actually intended to object, the language he employed concealed rather than revealed his disapproval. Under such circumstances, plaintiff cannot claim error on appeal because "it is not permissible to so frame an exception that it will serve to save an exception . . . yet conceal the real complaint from the trial court." *Maulding* v. *Louisville & Nashville Ry. Co.*, 168 F. 2d 880 (1948); *Krienke* v. *Illinois Cent. Ry. Co.*, 249 F. 2d 840 (1958); *Fort Worth & D. Ry. Co.* v. *Roach*, 219 F. 2d 351 (1955).

Furthermore, where the misconduct of persons affecting the jury is involved, merely calling the attention of the Court to the impropriety is insufficient; in the absence of a specific objection, it is not incumbent on the Court on its own motion to discharge the jury or take any other action. 89 C.J.S., Trial, Section 484, p. 136; Rule 46, Federal Rules of Civil Procedure; *Spreckels* v. *Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476 (1909).

Thus, the record clearly shows that plaintiff's attorney did not object when the Trial Court directed the court

reporter to enter the jury room and reread the charge to the jury.

In the absence of an objection, it has been uniformly held that directing a court reporter to reread instructions or testimony in the jury room is not reversible error. *Quinn* v. *Metropolitan St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46 (Sup. Ct., Mo., 1909); *Roberts* v. *Atlanta Consol. St. Ry. Co.*, 104 Ga. 805, 30 S. E. 966 (Sup. Ct., Ga., 1898); *Hahn* v. *Miller*, 60 Iowa 96, 14 N. W. 119 (Sup. Ct., Iowa, 1882); 66 C.J.S., New Trial, Section 62, p. 189, 89 C.J.S., Trial, Section 483, p. 134.

A similar question was presented in *Vigil* v. *Atchison, T. & S. F. Ry. Co.*, 215 P. 971, 28 N. M. 581 (Sup. Ct. of N. M., 1923). There, almost all the jurors were unable to speak, read or write English. After they retired to deliberate, they requested the Trial Court to furnish an interpreter to assist them. Pursuant to this request, and while counsel for both parties were present, the Trial Court directed the official Court interpreter to enter the jury room to assist the jurors. Defendant's attorney objected a few minutes later. The Trial Court overruled his objection and he appealed when the jury later rendered an adverse verdict. The Supreme Court of New Mexico affirmed stating: "Having stood by, without objection, until the interpreter had entered the jury room, Counsel will not be heard to thereafter object."

In Federal Courts, also, if a party learns of possible misconduct affecting the jury, he must object or be considered as having waived his right to raise the question on appeal. *Upton* v. *Harrison*, 68 F. 2d 232 (1934), cert. den. 54 S. Ct. 718, 292 U. S. 633, 78 L. Ed. 1486. (Waiver where plaintiff's attorney failed to object when a juror demanded that the attorney pay an overdue bill); *Berry* v. *DeWitt*, 27 Fed. 723 (1886). (Waiver where defendant's counsel failed to object when he overheard a juror expressing an opinion about the case to the plaintiff);

Spreckels v. *Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476 (1909). (Waiver where defendant's attorney failed to object when he learned that the jurors took into their deliberations a newspaper reporting thatt he judge favored the plaintiff); Rule 46, Federal Rules of Civil Procedure.

There are two reasons for the rule:

(1) "Although we think that the conduct . . . is highly improper, Counsel could not sit silently by and take chances on a favorable verdict and then complain when it turned out to be unfavorable. He is not permitted this to 'speculate upon the chances of a verdict'." *Upton* v. *Harrison*, 68 F. 2d 232 (1934), cert. den. 54 S. Ct. 718, 292 U. S. 633, 78 L. Ed. 1486; *Roberts* v. *Atlanta Consol. St. Ry. Co.*, 104 G. 805, 30 S. E. 966 (Sup. Ct., Ga., 1898).

(2) A party is required to communicate his objection so that the Court will be apprised of the party's position and thus be able to remedy the matter. Moore's Federal Practice, Volume 5, paragraph 4602, pp. 1902, 1903. Here, if plaintiff's attorney objected immediately, the Trial Court would probably have reconsidered and required the charge to be read in open Court because he clearly understood that the practice was unusual. Even if, plaintiff's attorney objected later, after the reporter entered the jury room, the Trial Court could have examined the jurors and the reporter to determine whether anything prejudicial actually occurred in the jury room. *Wheaton* v. *U. S.*, 133 F. 2d 522 (1943); Wigmore on Evidence, 3rd Edition, Volume 8, Section 2354, (5) (a), p. 703. Plaintiff's attorney, however, failed to object at any time during the trial and thus deprived the Trial Court of any opportunity to take corrective action.

Little v. *United States*, 73 F. 2d 861, which is the case relied upon by the petitioner, was a criminal case, and even more importantly, defendant's counsel in that crimi-

nal case objected to the procedure adopted, so much so that when the Court ruled against him, the Court took it upon itself to provide for an exception for the defendant's counsel in the ruling.

Otto v. *Young*, 43 Misc. 628, 88 N.Y.S. 188, is equally inapplicable because of the proper and complete objection interposed at the time of trial.

Parenthetically, we note that again when referring to to the actual language used, petitioner's counsel argued that the Trial Court would have found the other way and that the verdict was unusual and surprising (pp. 3-4 of petition).

The Trial Court's comments on the verdict should play no part in this petition and in any event should have been set forth fully as follows so that his position is clearly demonstrated.

> "While it was a close question of fact, as a matter of fact, I think I would have been inclined to (265) decided it the other way as to whether the driver was not negligent, but still it was a question of fact. It was for the jury.
>
> I am more used to having plaintiffs' verdicts where the jury has taken a different slant from the slant that I would have taken, but just because they did go a different way does not mean that it was against the weight of the evidence to the extent that I am entitled to set it aside. If I could put my finger on anything that I think has misled or prejudiced the jury in any way, that might make a difference. If there was some obvious explanation for what I think is an unusual verdict I would feel differently, but the case was very fairly presented on both sides. I have no reason to believe that the jury was inflamed in any way or prejudiced in any way. It is just one of the results of our having somebody different from us lawyers to decide these questions of fact." (120a)

Since neither a question sufficient to invoke the jurisdiction of this Court has been presented, and further, since the arguments advanced in support of the petition are deceptive and founded upon a false premise and are devoid of merit, it is respectfully requested that the petition for a writ of certiorari be denied.

Conclusion

WHEREFORE, the respondent prays that the petition be denied and that a writ of certiorari be refused.

Respectfully submitted,

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HAROLD V. McCOY,
Of Counsel.